Filed 7/15/19 P. v. Ford CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JASPER REDALE FORD, Defendant and Appellant.	A153363 (San Mateo County Super. Ct. No. 17-NF-006733-A)

Jasper Redale Ford pulled a knife on a store manager, threatened him, and then stole a computer tablet. He was convicted of robbery and making a criminal threat with use of a dangerous or deadly weapon. He challenges his robbery conviction and sentence. We affirm Ford's robbery conviction but reverse and remand for resentencing.

BACKGROUND

Ford entered an office supply store and put a notebook and pens in his pockets. An assistant store manager, Nathanyel Brown, told Ford he could leave if he returned the merchandise. Ford did so. About 10 minutes later, Ford reentered the store in different clothing. Brown followed and repeatedly asked Ford to leave. Ford grew agitated and told Brown to get away from him. When Brown persisted, Ford took a six-inch knife from his pocket, pointed it at Brown, and said, "I cut niggas like you." Brown backed up and called police. During the call, he saw Ford rip a security device off a computer tablet and leave. Ford was arrested about 20 minutes later. Police found a knife in Ford's pocket and found the tablet, another knife, latex gloves, clothing, and several tools in his backpack.

Brown testified, "[W]e're supposed to try to prevent [theft]. But I won't say we go out of our way to prevent them from taking it. Basically, I just observe and report it." Brown also testified the threat scared him, and "once the knife was pulled on me, . . . I figured the best thing to do was to call the police. . . . I'm not no superhero or anything."

Ford was convicted of second degree robbery (Pen. Code, § 212.5, subd. (c))[1] and making a criminal threat with use of a dangerous or deadly weapon (§§ 422, subd. (a), 12022, subd. (b)(1)). The court denied Ford's motion for new trial and granted probation, suspending execution of a four-year sentence on the criminal threat conviction (upper term of three years plus one year on the enhancement) and imposing a concurrent middle three-year term on the robbery conviction.

DISCUSSION

A.

Ford argues the trial court should have excluded evidence of the personal items, tools, gloves, and second knife found in his backpack when he was arrested. The court did not abuse its discretion under Evidence Code section 352. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 824.) The backpack's contents were relevant to prove Ford's intent to steal when he entered the store wearing the backpack. (See *People v. Wilson* (1965) 238 Cal.App.2d 447, 464 [holding defendant's burglary tools were admissible whether or not used in the burglary].)

B.

Ford contends the standard jury instructions on robbery (CALCRIM No. 1600) were inadequate because they did not sufficiently link the intent to steal with the use of force or intimidation. We review the correctness of jury instructions de novo (*People v. Posey* (2004) 32 Cal.4th 193, 218) and find no fault with the instructions here.

The jury was instructed that the prosecution must prove "when the defendant used force or fear, he intended to [steal]" and "[t]he defendant's intent to take the property must have been formed before or during the time he used force or fear." (CALCRIM

[1] Undesignated statutory references are to the Penal Code.

No. 1600.) Ford argues this allowed the jury to convict him of robbery if it found he reentered the store with an intent to steal, scared Brown for a reason *unrelated* to that intent to steal (e.g., annoyance at Brown's following him), and then stole the tablet. (See *People v. Anderson* (2011) 51 Cal.4th 989, 994 ["the act or force or intimidation by which the taking is accomplished must be motivated by the intent to steal"].)

The jury was properly instructed. First, the instruction did require the jury to connect Ford's use of force with his intent to steal—"when the defendant used force, he intended to [steal]." (CALCRIM No. 1600.) Second, even if we agree with Ford's parsimonious reading of that portion of the instruction, he overlooks another portion that required the prosecution to prove "[t]he defendant used force or fear *to take the property or to prevent the person from resisting*." (*Ibid.*, italics added.) Under this instruction, if the jury believed Ford's use of force or fear was unrelated to his intent to steal, it would have convicted him of the lesser-included offense of theft rather than robbery. Obviously, it did not do so, but Ford cannot blame the instructions.

C.

Ford maintains the trial court should have granted his motion for acquittal (see § 1118.1) because the evidence was insufficient to show he used force or fear to take the tablet. We disagree.

We review an order denying a motion for acquittal for sufficiency of evidence. (*People v. Cole* (2004) 33 Cal.4th 1158, 1212–1213.) That is, we review the whole record in the light most favorable to the prosecution "to determine whether it discloses . . . evidence which is reasonable, credible, and of solid value . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Ample evidence supports the inference Ford brandished a knife to stop Brown's interference with his efforts to steal from the store. Brown prevented Ford from stealing the notebook and pens. Minutes later, Ford came back in different clothes and with a backpack containing tools that could assist in a theft. When Brown followed him and told him to leave, Ford brandished a knife, which scared Brown and caused him to move

away. Ford then ripped a security device off the tablet and left. The jury could reasonably conclude Ford threatened Brown to keep him at bay while he stole the tablet. (See *People v. Hays* (1983) 147 Cal.App.3d 534, 541–542 [upholding robbery conviction where defendant's conduct caused victim to flee in fear, allowing defendant to steal victim's property].)

Ford mistakenly points to Brown's testimony suggesting that he (Brown) would not have tried to interfere with the theft even in the absence of the knife, and thus Brown's fear did not enable the robbery. We do not think this is a fair reading of Brown's testimony, but, more importantly, it was the jury's job to determine whether Ford used fear to steal the tablet. The same evidence cited above supports the jury's conclusion that he did so.

D.

Finally, Ford argues that, if this court affirms the robbery conviction on the ground that the criminal threats supplied the requisite use of force or fear (as we have), section 654 bars him from being punished for both the criminal threats and robbery convictions. We agree.

1.

We reject the People's threshold argument that this issue is not ripe because the court suspended execution of Ford's sentence when it granted him probation.

When a court grants probation, it may suspend the imposition or execution of a sentence. (See § 1203, subd. (a).) The People are correct that, when *imposition* of sentence is suspended, a section 654 argument is not ripe unless and until a sentence is imposed after revocation of probation. (See *People v. Martinez* (2017) 15 Cal.App.5th 659, 669, disapproved on other grounds by *People v. Ruiz* (2018) 4 Cal.5th 1100, 1122 & fn. 8.) "Because sentence was not imposed . . . , there is no double punishment issue." (*People v. Wittig* (1984) 158 Cal.App.3d 124, 137.) Accordingly, the Rules of Court do not require the trial court to consider section 654 when suspending imposition of a sentence. (See Cal. Rules of Court, rule 4.433, subd. (b).)

When suspending execution of a sentence, however, different rules apply. A sentence is imposed; only its execution is suspended. The court is required to consider whether any sentences run consecutively or concurrently (Cal. Rules of Court, rule 4.433, subd. (c)(3)) and determine whether section 654 requires a stay (Cal. Rules of Court, rule 4.424). The People are simply wrong that there is no difference between suspending a sentence and staying a sentence under section 654. And we summarily reject the People's suggestion that, because a probationer may never serve a suspended sentence, trial courts have no incentive to apply section 654 correctly and criminal defendants are indifferent to the issue.

The issue is ripe for review. The parties have fully briefed it. We will proceed to the merits.

2.

"It has long been recognized that where a defendant has been convicted of robbery and other crimes incidental to the robbery such as assault, section 654 precludes punishment for both crimes." (*People v. Mitchell* (2016) 4 Cal.App.5th 349, 354.) *Mitchell* is instructive. The defendant brandished scissors at a store clerk and said, "I will fuckin' kill you," then stole two boxes of chips. (*Mitchell*, at p. 352.) He was convicted of robbery and assault with a deadly weapon and sentenced to three years for the robbery plus a one-year consecutive sentence for the assault. (*Ibid.*) The court observed that the "single act of threatening the victim with scissors satisfied the [assault] requirement as well as the force or fear element of the robbery." (*Id.* at p. 353.) The court rejected the People's arguments (which they also make in this case) that the defendant had separate objectives for each crime and the assault could be punished separately because it was extreme and gratuitous. (*Id.* at pp. 353–354.)

Mitchell is indistinguishable from this case. We see no reason to make an exception to the general rule that section 654 bars separate punishments for an assault (or, in this case, a criminal threat) that is incidental to a robbery.

3.

The parties disagree about which sentence should be stayed under section 654. We agree with Ford that the criminal threats sentence must be stayed, but we will remand the case for resentencing, at which time the court may increase or decrease the sentence for robbery.

In cases where double punishment is prohibited, the defendant "shall be punished under the provision that provides for the longest potential term of imprisonment." (§ 654, subd. (a).) Enhancements are counted when comparing potential terms of imprisonment. (See *People v. Kramer* (2002) 29 Cal.4th 720, 723–725). Once the provision with the longest potential term has been identified, the trial court is free to choose among the range of sentencing options under that provision. (*Id.* at pp. 724–725.)

Here, the robbery conviction has the longest potential sentence. (See *People v. Kramer, supra,* 29 Cal.4th at pp. 723–724 [determining the longest potential sentence by reference to the statutes].) Second degree robbery is punishable by up to five years in prison (§§ 212.5, 213, subd. (a)(2)), whereas a criminal threat is punishable by up to three years (§§ 18, 422) and the relevant enhancement adds an additional year (§ 12022, subd. (b)(1)) for a total potential term of four years. Thus, the court should stay the criminal threat sentence.

We will remand the case for resentencing. The trial court imposed four years for the criminal threats conviction and the enhancement, but it chose the middle three-year term for the robbery. We note the trial court consistently expressed a desire to sentence Ford to four years in prison. We express no opinion on what sentence the trial court should impose. (See *People v. Kramer, supra,* 29 Cal.4th at pp. 724–725.) On remand, the trial court has discretion to increase or decrease the sentence. (See *People v. Serrato* (1973) 9 Cal.3d 753, 764 [no prohibition on imposition of more severe sentence after reversal of unauthorized sentence], disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Hester* (2000) 22 Cal.4th 290, 295 [sentence imposed in violation of § 654 is unauthorized].)

DISPOSITION

The suspended four-year sentence on the criminal threat conviction (upper term of three years plus one year on the enhancement) and three-year concurrent sentence on the robbery conviction are reversed, and the matter is remanded for resentencing. The judgment is otherwise affirmed.

_____
BURNS, J.

WE CONCUR:

_____
JONES, P. J.

_____
NEEDHAM, J.